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Supreme Court of the United States

No. 460

OCTOBER TERM, 1958

J. W. McDAVID, PETITIONER,

versus

FORD MOTOR COMPANY, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

C. T. GRAYDON,
1225 Washington Street,
Columbia, South Carolina,
Counsel for Petitioner.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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Petitioner prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on August 29, 1958.

CITATIONS TO OPINIONS BELOW

The order of the District Judge overruling respondent's motion for judgment n.o.v. is contained on pages 130 and 131 of the joint appendix. Since the trial was before a jury, no other order was issued and there is no printed report of the case from the Trial Court.

The opinion of the Circuit Court of Appeals, issued on August 29, 1958, is printed in the appendix hereto and will be reported in Federal Reporter Second.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 29, 1958, and a 60-day stay order was subsequently granted by that Court. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

The sole issue raised in this petition is whether or not an appellate court is to be allowed to substitute its judgment for that of a jury in a case in which there is a reasonable inference of a manufacturer's negligence.

In other words, the only question is whether or not the record presents a jury issue. The question is a proper grounds for issuance of a writ because of the increasing divergence in views between Circuit Courts as to the role of the jury and because of the failure of the Fourth Circuit to apply and follow the South Carolina rule.

STATEMENT

Plaintiff was injured near Camden, South Carolina when the right front tire of a new Ford blew out after only 2,000 miles of travel. Ford admits the tire was not of defective manufacture.

Ford's Camden dealer was notified and Ford's regional representatives examined the car and took both front tires to Detroit for testing. They made no report to plaintiff (or his wife) and suits were brought against Ford by plaintiff and his wife for personal injuries in the South Carolina courts. The suit by the wife for $3,000.00 was tried in the South Carolina court and resulted in a jury verdict for Mrs. McDavid which was paid after appeal was abandoned. This suit for $50,000.00 for personal injuries was removed to the United States District Court.

After suits were commenced, Ford attempted to shift the blame to the authorized Ford dealer from whom the car was purchased. The changing of the steering mechanism by this dealer was invoked as such an "intervening cause" as to relieve Ford of all liability.

But the testimony by plaintiff showed that the type of wear which caused the blowout was due to a factory adjustment not affected by the steering mechanism change. Without going into the technical differentiations which were presented in great detail at trial, the steering change affected **toe-in** while the wheels' vertical alignment was controlled by a factory-set **camber** adjustment.

Camber is adjusted by the insertion of shims in bolts which control the vertical tilt of each front wheel. Each adjustment must be made individually at the factory, and Ford's service instructions did not call for any further adjustment during the service period. In other words, the record shows that the camber adjustment was made by Ford and was not thereafter changed by the two Ford dealers which serviced the McDavid car.

The Trial Judge submitted the case to the jury which brought in a $20,000.00 verdict for plaintiff.

Ford appealed on many grounds, and the Circuit Court of Appeals for the Fourth Circuit reversed on the issue of Ford's liability. Although plaintiff's experts attributed the excessive tire wear to an improper camber adjustment, that court held that the proof of negligence because of camber was insufficient as a matter of law.

The testimony offered by Ford absolved the dealer from whom the car was purchased by plaintiff's wife of all blame, and another of Ford's witnesses cleared the dealer which made the 1,000 mile check of any fault. The mechanics from both of these dealers specifically eliminated any camber adjustment by either of these firms.

The effect of the holding by the Circuit Court of Appeals is a finding of fact that the wear in the tire was caused by some act of the plaintiff's wife, or some unknown party. But this holding is rebutted by:

(1) The fact that the examination of the car after the accident by Ford's representatives showed no prior damage to the steering mechanism.

(2) The fact that the tire tests failed to show any unusual, severe or damaging injury resulting from misuse of the car while driving.

(3) The fact that the plaintiff's wife recalled no such accident or mishap.

(4) The fact that camber, as compared with toe-in, would have a tendency to improve upon the wheel's striking a hole.

(5) The fact that the right front tire showed physical evidence of wear attributable only to a camber maladjustment.

The opinion holds that this "excessive camber could have been introduced by Ford when it initially made the adjustment during assembly of the automobile." But that Court then said that this inference as to camber was tenuous and conjectural and that judgment should be entered for Ford.

The effect of the Circuit Court's ruling was to make a finding of fact that it was the act of Mrs. McDavid or some unknown party which caused the camber maladjustment—and there was not a scintilla of evidence or the slightest inference to support this finding. Having eliminated the two authorized Ford dealers by testimony, Ford left no one else to blame.

And how were Mrs. McDavid and any unknown party absolved? Again, by the acts of Ford which took the tires and had its technical experts examine the steering appara-

tus. Ford did not introduce its technical report on the tires, but no where in the record is there any evidence or even inference that the tires or the steering apparatus had been damaged or otherwise misused.

The reasonable and proper inference from the testimony was that Ford's setting of the camber caused the unusual wear on the right front tire (as compared with much lesser wear on the left front tire).

Toe-in alone would have worn the tires equally so that the only reasonable inference was that excessive camber caused the excessive right tire wear which caused the blow-out.

When the new Ford car rolled over in the ditch, the McDavids immediately and logically notified Ford. And the others to whom they might have looked for redress were eliminated at the trial by Ford's presentation of the case.

REASONS FOR GRANTING THE WRIT

While the Circuit Court admitted the rule that conflicting inferences from circumstantial evidence should be resolved by a jury, for some reason not apparent in the opinion it said that the claim against Ford should be dismissed. The rule adopted by this Circuit Court in this case has the effect of eliminating circumstantial evidence in all cases of this type.

That the Court has retried the factual issues in arriving at its decision is apparent. It has adopted Ford's defense—that is, that Mrs. McDavid abused the car in some way which caused a steering maladjustment. But there is no evidence to support this finding.

Had, for example, the plaintiff sued his wife in addition to Ford, it is our view that the Trial Judge would have had to direct a verdict as to her. But the Circuit Court

has selected her (or some unknown agent) as the party responsible.

What other party should McDavid have sought to hold?

(1) The manufacturer of the tire? But Ford admits that the tire was not defective.

(2) The authorized Ford dealer which sold and serviced the car? But the man who did the work and serviced the car said that he did not adjust camber.

(3) The authorized Ford dealer which serviced the car after 1,000 miles? But the mechanic who did that work disclaimed any responsibility for the camber adjustment.

Like a straw man Ford knocked the dealer by which the car was serviced out of the case by producing the mechanic who actually did the work on this particular car; he said that the changeover to power steering was done with the correct adjustment for toe-in but without touching the camber. So also the 1,000-mile check mechanic said his work on the steering mechanism was correct.

Not one worker, inspector or supervisor from the assembly line in the Ford factory was produced to detail anything specific about the manufacture of the McDavid car. A so-called expert from "Central Staff Quality Control" at the Ford factory testified generally as to the assembly methods, but not one record, not one inspection sheet and not one report was produced with reference to this car—and that included the report which Ford made on the tires involved in this case, although Ford took the tires to Michigan for the purpose of testing the same to determine the cause of the unusual wear in the right tire.

This in effect eliminated everyone but the car's manufacturer (Ford) and the car's owner (the plaintiff's wife). From these two the Circuit Court has selected Mrs. McDavid as the perpetrator of her husband's misfortune. The jury, on the other hand, selected Ford.

In few, if any, of the cases based on a manufacturer's negligence can the claimant produce direct evidence of negligence. The car owner does not have access to the assembly line. Even the jury was not allowed to see anyone from Ford's assembly line. The car owner cannot check the garage where the car is serviced; he is at the mercy of these experts. But the courts have approved the use of circumstantial evidence in such cases.

The case presents a jury issue as clearly as any case based on circumstantial evidence under the South Carolina rule. And we think that this case more than measures up to the rule announced elsewhere.

The rule in South Carolina differs somewhat from that in some other jurisdictions as to the submission of cases to a jury. In *Moorer v. Dowling*, 216 S. C. 456, 58 S. E. (2d) 734, it is stated:

> "Not only should consideration of the facts be submitted to the jury when they are in dispute, but the jury must also pass on the questions of inference to be drawn from such facts after they have been determined. . . .
>
> "If the inferences properly deducible from the evidence are doubtful or if they tend to show both parties guilty of negligence or willfullness, and there may be a fair difference of opinion as to whose act produced the injury complained of as a direct and proximate cause, then the question must be submitted to the jury. *Harrison v. Atlantic Coast Line R. Co.*, 196 S. C. 259, 13 S. E. (2d) 137."

It is not the province of the Court to weigh the testimony, but if there is testimony which tends to establish the material averments of the plaintiff's cause of action, then the issue is one for the jury. *Major v. McCurdy*, D. C., E. D. S. C., 1953, 118 F. Supp. 537.

Some other South Carolina cases are pertinent:

Odum v. Weatherbee, 225 S. C. 253, 81 S. E. 2d 788:

> "It is the law of this state that a case should be submitted to the jury not only when the testimony is conflicting, but likewise when the inferences from it are in doubt."

Hiers v. South Carolina Power Co., 198 S. C. 280, 17 S. E. 2d 698:

> "The jury has the special prerogative to decide the facts, if the evidence tends to sustain the reasonable probability of the manner or way relied upon by the plaintiff even if the injury might have occurred in one of a dozen ways. The law does not require proof to a certainty in a civil suit."

Woodle v. Brown, 223 S. C. 204, 74 S. E. 2d 914 (from the headnote):

> "Under the 'scintilla rule' which prevails in South Carolina, if there is a 'scintilla of evidence' which is any material evidence that if true would tend to establish the issue in the mind of a reasonable juror, the case should be submitted to the jury for its determination."

See *Tallevast et al. v. Herzog et al.*, 225 S. C. 563, 83 S. E. 2d 204; 88 *Corpus Juris Secundum*, Trial No. 208, pp. 422-423.

The rule in South Carolina as to circumstantial evidence applies even though the doctrine of *res ipsa loquitur* does not obtain in this jurisdiction. The rule is summarized in *Barnwell v. Elliott et al.*, 225 S. C. 62, 80 S. E. 2d 748, as follows:

> "It is elementary that negligence may be established by circumstantial evidence, *Thornton v. Seaboard Air Line Ry. Co.*, 98 S. C. 348, 82 S. E. 433; *Watson v. Coxe Bros. Lumber Co.*, 203 S. C. 125, 26 S. E. (2d) 401. And in considering the sufficiency of such evidence, 'the facts and circumstances shown

should be reckoned with in the light of ordinary experience and such conclusions deduced therefrom as common sense dictates.' *Lee v. New South Express Lines*, 192 S. C. 527, 7 S. E. (2d) 459, 462. The fact that the doctrine of *res ipsa loquitur* is not applied in this jurisdiction does not mean that negligence may not be established by circumstantial evidence as well as direct evidence. *Eickoff v. Beard-Laney, Inc.*, 199 S. C. 500, 20 S. E. (2d) 153, 141 A. L. R. 1010. It is also important to bear in mind that the fact that an injury may have been caused in one of two or more ways does not preclude recovery, 'if the facts and circumstances in evidence warrant a reasonable inference that it was caused in any way alleged in the complaint for which the master would be liable.' *Steele v. Atlantic Coast Line R. Co.*, 103 S. C. 102, 87 S. E. 639, 643."

That the liability is to be determined in accordance with the law of South Carolina is well settled. *Bernhardt v. Polygraphic Co. of America*, 76 S. C. 273, 350 U. S. 198, 100 L. Ed. 199. The function of the jury has been set out by this Court in numerous cases, and it is not essentially different from that in South Carolina—although the scintilla rule is not in effect in the majority of jurisdictions.

But whether the evidence here is tested by the "scintilla" rule or the "reasonable inference" rule, a jury issue was presented and the opinion of the Circuit Court is a usurpation of the jury's function. The general rule as to the role of the jury has been considered by this Court in many cases.

In *Schulz v. Pennsylvania R. Co.*, 350 U. S. 523, 100 L. Ed. 668, 76 S. Ct. 608, this Court reversed in a case brought under the Jones Act when the Trial Judge refused to submit the issue of negligence, based on purely circumstantial evidence, to a jury. The Circuit Court had affirmed the District Court. And this Court said in language hearten-

ing to those who believe in the fact-finding function of the jury:

100 L. ed 671:

"In considering the scope of the issues entrusted to juries in cases like this, it must be borne in mind that negligence cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre. Surveyors can measure an acre. But measuring negligence is different. The definitions of negligence are not definitions at all, strictly speaking. Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done, or of failing to do that which a person of reasonable prudence would have done under like circumstances. Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. 'We think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' *Jones v. East Tennessee V & G. R. Co.*, 128 U. S. 443, 445, 32 L. ed. 478, 480, 9 S. Ct. 118 (1888)."

In *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 88 L. ed. 520, 64 S. Ct. 409, this Court granted *certiorari* in an action brought under the Federal Employees' Liability Act when a Circuit Court reversed a jury award. This Court said in that case:

88 L. ed 525:

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the

court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 571, 572, 34 L. ed. 235, 241, 242, 10 S. Ct. 1044; *Tiller v. Atlantic Coast Line R. Co., supra* (318 U. S. 68, 87 L. ed. 618, 63 S. Ct. 444, 143 A. L. R. 967); *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, 353, 354, 87 L. ed. 1444, 1447, 1448, 63 S. Ct. 1062. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

Both these cases were brought under statutes providing for jury trial, but the Seventh Amendment specifically preserves and protects the fact-finding function "according to the rules of the common law."

Similar cases were presented in *Rogers v. Missouri P. Ry. Co.*, 1 L. Ed. (2d) 493, 515; *Webb v. Illinois C. R. Co.*, 1 L. Ed. (2d) 503, 515; *Herdman v. Pennsylvania R. Co.*, 1 L. Ed. (2d) 508, 515, and *Ferguson v. Moore McCormick Lines*, 1 L. Ed. (2d) 511, 515. As stated in the *Rogers case*, a jury question is presented when a conclusion may be drawn fixing liability "whether or not the evidence allowed the jury a choice of other probabilities. Circumstantial evidence is not only sufficient, but may be more satisfying and convincing in meeting these criteria than direct evidence."

The action here is a common law one for negligence—and as the Fourth Circuit said in *Kyle v. Swift & Co.*, 229 F. (2d) 887:

"It is well settled that for such purpose the evidence must be viewed in the light most favorable to the plaintiff and every inference favorable to the plaintiff which can reasonably be drawn therefrom must be drawn."

In the cases cited by the Circuit Judge in support of that Court's opinion, there was no evidence of specific defects in the particular machine or vehicle involved, but here there was positive evidence as shown on the face of the tire of a defect in **camber**—a factory adjustment.

The cases which are most persuasive of our position came from the Fourth Circuit: *Pierce v. Ford Motor Co.*, 190 F. (2d) 910, cert. den. 72 S. Ct. 178, 342 U. S. 887, 90 L. Ed. 666 and *Ford Motor Co. v. Malone*, 205 F. (2d) 267. Those cases are almost identical with this case on the facts, and the law applied there is the law which would have applied here. The Circuit Court specifically passed on a case in which the shims had been adjusted by a mechanic of the authorized Ford dealer; the Court held that this made a **jury issue.**

As in *Carpini v. Pittsburgh and Weirton Bus Company and General Motors*, 216 F. (2d) 404, Ford cited its experience and care on its assembly line. But as the Third Circuit Court said in the *Carpini case* of similar evidence: "But, of course, it was not conclusive any more than evidence of general practice in an industry is conclusive on whether operations are conducted with due care."

In this case, the Fourth Circuit has adopted a judicial rule in weighing the sufficiency of the evidence which is contrary to the rules set down by this Court, by itself, by other Circuit Courts and by the Supreme Court of South Carolina. It says in effect that the reasonable and logical explantation of the blowout—wear caused by a factory maladjustment of camber—"is so tenuous that it rests merely upon speculation and conjecture."

We are aware that this Court cannot consider every case which is wrongly decided by Circuit Courts, but this is a case in which this Court can spell out in a negligence case the guiding principles which are to govern Circuit Courts in such cases so that the litigant in the Fourth Circuit obtains the same treatment as those elsewhere.

The verdict of a jury is conclusive on an appellate court in a case where the evidence supported that verdict. This was such a case, for the evidence of the cause of the wear which resulted in the blowout pointed to Ford alone.

The defect was one which could not be seen upon an ordinary inspection, and the fact that the dealers did not discover the defect could in no wise absolve Ford from liability for its negligence.

The factual issue was resolved against Ford by a South Carolina jury; the Federal District Judge properly overruled Ford's motions for a direction of verdict in its favor. The Circuit Court erred in taking the case from the jury.

CONCLUSION

That is the basis upon which we seek review by this Court; the jury is the fact-finding arbiter under our system of jurisprudence. That principle needs to be declared in common-law negligence cases by this Court.

Respectfully submitted,

C. T. GRAYDON,
AUGUSTUS T. GRAYDON,
1225 Washington Street,
Columbia, South Carolina,

JOHN C. WEST,
Camden, South Carolina,
Attorneys for Petitioner.